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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1286

BOSTON AND MAINE CORPORATION,
Respondent,

v.

CHICAGO AND NORTH WESTERN
RAILWAY COMPANY,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: April 1, 1968.

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v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Chicago and North Western Railway Company, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, filed in the above entitled case on February 19, 1968.

Citations to Opinions Below

The Second Circuit's order granting summary affirmance of the District Court judgment was without opinion. The order is printed in the Appendix to this petition, page 1a.

The order and judgment of the District Court is printed in the Appendix at pages 2a-5a; it is based upon an unreported opinion of the Honorable Harold R. Tyler, Jr., printed in the Appendix at pages 5a-7a.

Jurisdiction

The order of the Court of Appeals was filed on February 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. In a suit to enforce an arbitration award (arising out of a controversy involving interstate commerce), does the United States Arbitration Act, 9 U.S.C. §§ 1-14, allow the interposition of defenses and counterclaims which the arbitrators held they were without power to consider?

2. When there had been no demonstration of prejudice, did the Second Circuit err in its departure from the accepted and usual course of judicial procedure by granting respondent's motion for summary affirmance of the District Court judgment before petitioner served and filed a brief on appeal?

Statute Involved

The statutory provisions involved are Sections 9 and 10 of the United States Arbitration Act, 9 U.S.C. §§ 9 and 10. They are printed in the Appendix, pages 39a-40a.

Statement

Petitioner, Chicago and North Western Railway Company ("North Western"), and respondent, Boston and Maine Corporation ("Boston & Maine"), are common carriers by rail, engaged in the transportation of property. The basis for federal jurisdiction involved in the District Court was 28 U.S.C. § 1332: diversity of citizenship in a civil action where the matter in controversy exceeds $10,000.

The District Court granted Boston & Maine summary judgment on the first claim in its complaint, which sought

enforcement of an arbitration award rendered by the Accounting Division of the Association of American Railroads ("AAR")*. The award held that North Western had violated AAR Freight Mandatory Rule 149 (Appendix, p. 40a) and must pay Boston & Maine $185,829.18 plus any amounts due Boston & Maine subsequent to April, 1965. (The award and opinions of the arbitrators are printed in the Appendix, pp. 8a-26a). Specifically, Judge Tyler (i) dismissed all complete affirmative defenses raised in North Western's answer, (ii) severed North Western's first and second counterclaims and consolidated them with *Chicago & N.W. Ry.* v. *Boston & Maine R.R.*, Civil Action No. 152-267 (already consolidated with *Baltimore & O. R.R.* v. *New York, N.H. & H. R.R.*, Civil Action Nos. 148-323, *et al.*), (iii) ordered North Western to pay Boston & Maine $264,519.41, plus court costs, and (iv) ordered North Western to pay all interline freight balances withheld from June 30, 1967, to September 14, 1967, together with interest. Further, the District Court enjoined North Western from offsetting per diem claims against interline freight balances due Boston & Maine. (The order and judgment of the District Court is printed at pp. 2a-5a of the Appendix.)

The controversy underlying the arbitration award and subsequent litigation in the courts below began in 1953, when Boston & Maine and other railroads withdrew from the agreement of the members of the Association of American Railroads to pay standard sums for the use and "rental" of freight cars belonging to member roads. *See Association of American Railroads—Agreement*, 277 I.C.C. 413 (1950), *modified*, *Ahnapee & W. Ry.* v. *Akron & B.B.R.R.*, 300 I.C.C. 73 (1957).

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* Petitioner and respondent are members of the AAR. The Accounting Division of the AAR has promulgated a number of rules and forms providing procedures for the handling of matters relating to interline freight, overcharge, passenger and disbursement accounting. These rules are either mandatory or recommendatory; disputes over the application of a mandatory rule can be submitted to the appropriate arbitration committee of the Accounting Division.

Because the shipment of freight in railroad cars from one point to another often involves originating and terminal locations not serviced by the same railroad, freight is frequently routed over the lines of several railroads before reaching its final destination. The amount charged for the use of freight cars by non-owner railroads is termed "per diem" charges.

Routing of cars over connecting lines also results in revenue for the interline as well as terminal carrier. Depending on the method of payment employed, either the originating or destination carrier will receive payment for the entire transportation charge. This revenue is then allocated among the interline carriers according to their pro rata share, and tallied on a monthly basis with interline charges owing other railroads, the results of which are known as "interline freight balances."

In *Chicago, B.&Q.R.R.* v. *New York, S.&W.R.R.*, 297 I.C.C. 291 (1955), the Interstate Commerce Commission found that the per diem charges established by the AAR were just, reasonable and otherwise lawful on the ground that a lower rate would not be compensatory. At the behest of Boston & Maine and other carriers, a three-judge District Court in Massachusetts reviewed the Commission's decision. The court sustained the Commission's jurisdiction to determine the reasonableness of per diem charges but remanded the proceeding for more detailed findings by the I.C.C. *Boston & Maine R.R.* v. *United States*, 162 F. Supp. 289 (D. Mass.), *appeal dismissed*, 358 U.S. 68 (1958).

Ten years later, the Commission in *Chicago, B.&Q. R.R.* v. *New York, S.&W. R.R.*, 332 I.C.C. 176 (1968), *review pending, Boston & Maine Corp.* v. *United States*, Civil Action No. 68-79-G (D. Mass. Complaint filed January 30, 1968); *Union Pac. R.R.* v. *United States*, Civil Action No. 02981 (D. Neb. Complaint filed February 23, 1968), disapproved of the rates provided in the AAR agreement and, pursuant to its authority under Section 1(14)(a) of the Interstate Commerce Act, established per diem rates for 1953 through 1965.

Prior to commencing its action in Massachusetts to review the 1955 determination of the Commission, Boston & Maine had petitioned the Commission for a finding that the terms and conditions under which the AAR per diem agreement was approved were not in conformity with the standards of Section 5a of the Interstate Commerce Act, 49 U.S.C. § 5a. *Ahnapee & W.Ry.* v. *Akron & B.B.R.R.*, 300 I.C.C. 73, *aff'd on reconsideration*, 302 I.C.C. 265 (1957). In an opinion rendered subsequent to the commencement of the suit in Massachusetts, the Commission sustained the compliance of the AAR agreement with the Interstate Commerce Act and further delineated the right of participating carriers to insist that nonparticipating carriers tentatively pay the per diem charges at rates arrived at through AAR procedures. 300 I.C.C. at 84.[1]

North Western sought to collect per diem revenues due from Boston & Maine in a suit before the Southern District of New York. *Chicago &N.W. Ry.* v. *Boston & Maine R.R.*, Civil Action No. 152-267. The District Court, pursuant to its decision in *Baltimore & O. R.R.* v. *New York, N.H. & H. R.R.*, 196 F. Supp. 724 (S.D.N.Y. 1961), granted North Western partial summary judgment against Boston & Maine in such amount as found by that court to be due based upon a rate to be found just, fair, reasonable and nondiscriminatory by the Interstate Commerce Commission, and thereafter, to be ultimately fixed by that court.

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[1] Upon reconsideration, 302 I.C.C. 265 (1957), the Commission rejected Boston & Maine's argument that it had a right to determine, subject to Commission approval, a per diem rate different from the one established by the AAR procedures and to refuse to settle at any other rate. *Id.* at 268. In a subsequent petition (dated May 19, 1961) to reopen the *Ahnapee* proceedings, Boston & Maine urged that North Western and others had been withholding interline freight balances from Boston & Maine and thus were in violation of certain orders and decisions of the Commission. The petition was denied in an unreported order dated October 16, 1961. On February 27, 1962, Boston & Maine's subsequent petition for reconsideration was also denied. The withholding of interline freight balances to offset per diem balances was in issue before the courts below.

In *Baltimore & Ohio,* Chief Judge Ryan stated:

> "Plaintiffs [North Western and others] are entitled to attempt to collect the rate established as reasonable and, if declared unreasonable, to be made whole on a quantum meruit basis. . . ." 196 F. Supp. at 736.

North Western thus being entitled to per diem, albeit for an amount undetermined except by the agreement approved in *Association of American Railroads—Agreement,* 277 I.C.C. 413 (1950), *modified, Ahnapee & W. Ry.* v. *Akron & B.B.R.R.,* 300 I.C.C. 73 (1957), commenced withholding from Boston & Maine, in January, 1960, interline freight balances commensurate with the per diem charges owed to North Western. At all times, however, North Western paid Boston & Maine interline freight revenues sufficient to allow the latter to pay its intermediate carriers the full interline freight balances due them.

When, in July, 1965, Boston & Maine instituted an arbitration proceeding before the Accounting Division of the Association of American Railroads for the interline freight balances withheld by North Western, North Western asserted that it had the legal right to offset per diem revenues due it against interline freight balances due Boston & Maine.

The arbitrators, in accordance with the limited jurisdiction provided for in Mandatory Arbitration Rule 1[2]

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[2] "Procedure in Respect to Application of Rules and in Cases of Disagreements.

"When any member of this Division disagrees with another member *as to the application of a mandatory rule,* he may submit his case to the Secretary for presentation to the appropriate Arbitration Committee for a decision. The decision of the majority of that Committee shall be binding on the parties involved, except that they shall have the right to appeal to the Appeal Committee on matters involving freight and overcharge rules, as provided by Rule 33." Railway Accounting Rules 377 (1965) (Emphasis added).

See also Mandatory Arbitration Rules 22, 25 and 26, Appendix, pages 41a-42a.

refused to consider "the legal aspects of the case" and refused to pass upon North Western's right to offset.

Arbitrator Chairman Goodyear made it very clear that the arbitrators could only look to the application of Mandatory Freight Rule 149 [3] and must exclude any consideration of the availability of per diem offset. He stated:

> "The C&NW in their brief, rely upon court decisions holding that their right to set-off does exist against liability on written instruments, whether negotiable or non-negotiable. The C&NW further state that their claim for per diem balance is such a claim against the B&M and set-off of such a claim against the amount of B&M sight drafts is thus a legal right available to C&NW. In answer to the C&NW's contention, I wish to point out that this Committee cannot consider the legal aspects of this case but must confine their decision to the evidence contained in these papers in accordance with the Mandatory Rule as provided for in Arbitration Rules 22 and 26-a. Further, it was stated in Overcharge Arbitration Case 1050 by Arbitrator Tague that the Arbitration Committee may come to a decision only by a literal interpretation of the rules and may not reach a conclusion, no matter how reasonable, or logical, which is arrived at by reading into the rules something which is not there." Appendix, pages 16a-17a.

This narrow interpretation of the scope of the Mandatory Rules was subsequently affirmed by the AAR Arbitration Appeals Committee. Appellate Arbitrator Willoughby stated:

> "This arbitration committee cannot consider legal aspects, but must confine their decisions on the evidence contained in this file in accordance with Railway Accounting Rules." Appendix, page 25a.

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[3] Appendix, page 40a.

The award reflected the limited jurisdiction of the arbitrators:

> "The Interline Freight Accounting Arbitration Committee, composed of Messrs. R. D. Plumley (Substitute), J. E. McWhite, and W. H. Goodyear, Chairman, rendered a unanimous award holding that the Chicago and North Western Railway Company violated the provisions of Freight Mandatory Rule 149 and must pay the Boston and Maine Railroad $185,829.18 plus any amounts due the Boston and Maine subsequent to April, 1965." Appendix, pages 12a-13a. (Emphasis omitted.)

Reasons for Granting the Writ

It is important for the guidance of federal courts reviewing commercial arbitration awards that this Court delineate the extent (under federal law) to which defenses and counterclaims may be interposed. It is clear that in actions for confirmation of awards under Section 9 of the United States Arbitration Act (the "Act"), 9 U.S.C. § 9, awards may be vacated only upon the limited grounds enumerated in Section 10 of the Act. However, assuming there is no dispute concerning an award's validity, but there are independent defenses and counterclaims which have not been waived by an agreement for confirmation of an award by entry of judgment, then such claims should be available in an action to enforce an award.

When an arbitration agreement provides for the entry of judgment by a court upon an award made pursuant to arbitration, then any party to the agreement may apply to the court for an order confirming the award. 9 U.S.C. § 9 (Appendix, p. 39a). If an agreement for the entry of judgment has been made, the court *must* confirm the award unless it is vacated, modified or corrected as provided in Sections 10 and 11 of the Act. *Id.*

In AAR Mandatory Arbitration Rule 1 (Appendix, p. 41a) however, there is no provision for the entry of judg-

ment upon an award. Respondent, in its complaint before the District Court, sued for judgment *enforcing* the AAR arbitration award, an action not specifically covered by the Act.[4]

The Federal Rules of Civil Procedure are applicable to actions in which the Act fails to provide for specific resolution of a controversy, Fed. R. Civ. P. 81(a)(3), and the Federal Rules allow the interposition of affirmative defenses, Fed. R. Civ. P. 8(c) and 12(b), and counterclaims, Fed. R. Civ. P. 13(b).

Petitioner submits that the Act does not foreclose it from asserting in an action to *enforce* an award: (a) the defense that any amounts due respondent in interline freight revenues had been paid by petitioner by offsetting amounts due from respondent for per diem revenues, and (b) counterclaims against respondent for $185,829.18 for the hire and use of petitioner's freight cars from August, 1953 to April, 1965.

The arbitrators could not and did not pass upon petitioner's defense and counterclaims; it therefore follows that petitioner was free to assert that defense and those counterclaims in the action at law in the District Court below.

The decision of the District Court granting respondent summary judgment enforcing the award was premised on the following grounds:

(1) "[T]he arbitrators considered the set-off point under Freight Mandatory Rule 149 but rejected defendant's [North Western's] contentions" Appendix, p. 6a.

(2) "By the terms of the arbitration agreement and submission, the award is final and binding. It should be enforced according to federal law. 9 U.S.C. § 1 et seq." *Id.*

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[4] There is apparently no dispute that the arbitration agreement involved herein (AAR Mandatory Arbitration Rule 1) is governed by the United States Arbitration Act. See *Boston & Maine Corp.* v. *Chicago, B. & Q. R.R.*, 381 F. 2d 365 (2d Cir. 1967).

On the first ground the District Court plainly erred because the arbitrators themselves held they were without power to consider petitioner's legal right to offset. This is clear from their statements and the arbitration award itself (both set forth at pp. 7-8 hereof and pp. 12a-13a, 16a-17a and 25a of the Appendix).[5]

Since the arbitrators refused to pass upon petitioner's right to offset, such right must be available as an affirmative defense in an action at law to judicially enforce the award.

The same result obtains when Point 2, above, is analyzed. In an action to summarily confirm an arbitration award pursuant to Section 9 of the United States Arbitration Act, the reviewing court *must* confirm the award unless it is modified, vacated or corrected under Sections 10 and 11 of the Act. 9 U.S.C. § 9. However, in an action not involving confirmation, such as the one at bar, the Federal Rules apply, Fed. R. Civ. P. 81(a)(3), and the Federal Rules allow the interposition of defenses and counterclaims. Consequently petitioner's counterclaims should not have been severed and its defenses should not have been stricken without an adjudication on the merits.

The Second Circuit in affirming without opinion adopted the reasoning of the District Court, and in so doing, erred.

With the increasing number of commercial arbitration cases governed by federal law (*See Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400-01 (1967);

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[5] *Boston & Maine Corp.* v. *Chicago B.&Q. R.R.*, 381 F. 2d 365 (2d Cir. 1967), relied on by the District Court (Appendix, p. 6a), should not be followed. In that action, plaintiff was granted summary judgment enforcing an arbitration award rendered by the Accounting Division of the AAR. Defendant's defenses and counterclaims asserting its right to per diem revenues were dismissed. North Western urges that the disposition of that case was erroneous (a) because of the narrow scope of the arbitration agreement (AAR Mandatory Arbitration Rule 1), (b) because defendant had not waived its rights to assert defenses and counterclaims by agreeing to confirmation of the award by entry of judgment and (c) because the Federal Rules allow the interposition of defenses and counterclaims.

R. Coulson, *Prima Paint: An Arbitration Milestone,* 23 Bus. Law. 241 (1967)) it is imperative in judicial review of arbitration awards not involving confirmation, that the limitations on the interposition of defenses and counterclaims in an action at law be defined. This is an important question which has not been, but should be, decided by this Court.

The Second Circuit also erred in the procedure followed in its summary affirmance of the judgment of the District Court. The chronology of the relevant procedural steps taken in this case are as follows:

August 4, 1967:	Opinion of Judge Tyler filed.
September 14, 1967:	Order and Judgment of the District Court entered.
October 11, 1967:	Notice of Appeal filed.
January 5, 1968:	Record on appeal docketed in the Second Circuit.
February 9, 1968:	Petitioner filed a motion in the Second Circuit returnable February 19, 1968 for an order for an extension of time (to March 12, 1968) in which to file its brief on appeal. (The brief on appeal was due, under the Second Circuit rules, on February 6, 1968, which, by stipulation had been extended to February 13, 1968.)
February 13, 1968:	Supersedeas Bond filed.
February 14, 1968:	Respondent filed a motion in the Second Circuit returnable February 19, 1968 "for summary affirmance of the judgment of the District Court or alternatively to dismiss the appeal on the grounds that the appeal is frivolous, raises no substantial question and is interposed solely for the purpose of delay." Appendix, page 33a.

February 16, 1968:	Petitioner filed a memorandum in opposition to respondent's motion.
February 19, 1968:	The Second Circuit granted, from the bench, respondent's motion for summary affirmance, and denied, as moot, petitioner's motion for an extension of time.

Petitioner urges that the Second Circuit's summary affirmance of the District Court judgment, before petitioner filed a brief on appeal, so far exceeded the accepted and usual course of judicial procedure that this Court should exercise its powers of supervision and review these proceedings.

Petitioner affirmatively demonstrated by the affidavit of Larry S. Provo, President of North Western (Appendix, pp. 31a-32a), and the affidavit of Donald L. Wallace, counsel for petitioner in the instant litigation (Appendix, pp. 29a-30a), that petitioner's request for an extension of time to prepare and file a printed brief on appeal was being sought in good faith and not for delay. Those affidavits demonstrate that the only reason for not having filed such brief, on or before the due date, was that settlement negotiations had been conducted between petitioner and respondent, which became complicated as a result of the Commission's Report and Order in the per diem controversy, dated January 17, 1968 and issued on January 30, 1968, *Chicago, B.&Q.R.R.* v. *New York, S.& W.R.R.*, 332 I.C.C. 176.

These affidavits were not rebutted by respondent (see the affidavit of Robert S. Ogden, Jr. Appendix, pp. 34a-38a) and, in fact, respondent did not assert that it would be prejudiced by the extension sought by petitioner. Nor could respondent have demonstrated any prejudice. The judgment of the District Court had been entered and was earning the legal rate of interest and had been secured by the filing of a supersedeas bond for $301,691.00.

Petitioner submits that the Second Circuit's action in summarily affirming the District Court judgment, without any demonstration of compelling urgency or prejudice to respondent, and before petitioner had filed its brief on appeal, was an abuse of discretion requiring this Court to exercise its supervisory powers and review the procedures employed below.

The Second Circuit's action departed from the accepted and usual course of procedure for circuit court review of a civil action on appeal from a federal district court. *See, e.g., Moist* v. *Belk*, 380 F.2d 721 (6th Cir.), *cert. denied*, 389 U.S. 960 (1967) (appeal perfected before appellees moved to dismiss the appeal as frivolous); *Ginsburg* v. *American Bar Assoc.*, 277 F.2d 801 (7th Cir.), *cert. denied*, 364 U.S. 829 (1960) (brief on appeal filed before appellees moved to affirm the orders appealed from). Final judgment having been rendered against petitioner in the District Court, petitioner had a right to appeal to the Second Circuit. Summary affirmance by that court was a denial of procedural due process to petitioner. The summary disposition of the appeal denied petitioner an opportunity to fully present its detailed and complete arguments concerning the proper construction of the United States Arbitration Act.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 1, 1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. _____

BOSTON AND MAINE CORPORATION,
Respondent,

v.

CHICAGO AND NORTH WESTERN
RAILWAY COMPANY,
Petitioner.

APPENDIX

Order of the United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of February, one thousand nine hundred and sixty-eight.

No. 31995

BOSTON AND MAINE CORPORATION,
Plaintiff-Appellee,

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Defendant-Appellant.

It is hereby ordered that upon consideration of the motion made herein by counsel for the appellee by notice of motion dated February 14, 1968 for summary affirmance or, in the alternative, to dismiss the appeal for frivolousness that the judgment of the United States District Court for the Southern District of New York, be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Before:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
U.S.C.J.J.

HON. EDWARD T. GIGNOUX,
U.S.D.J.

Order and Judgment of the United States District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BOSTON AND MAINE CORPORATION,

Plaintiff,

against

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Defendant.

On defendant's motion filed April 25, 1967 for consolidation of this case with Civil Action 152-267, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure; and on plaintiff's motions, pursuant to Rules 12(b)(6), 12(c), 12(f), 42, 54(b) and 56(a) of the Federal Rules of Civil Procedure, to strike affirmative defenses and for summary judgment on the first claim presented by the complaint and to dismiss defendant's first and second counterclaims or in the alternative to sever said counterclaims and consolidate them with Civil Action 152-267; and upon the affidavits of Donald L. Wallace dated April 25, 1967 and July 5, 1967, the affidavit of Robert S. Ogden, Jr., dated May 25, 1967, the affidavit of Andrew C. Weamer dated May 23, 1967, the affidavit of John C. Castle, dated May 29, 1967, the affidavit of J. M. Johnson dated July 3, 1967; and upon plaintiff's and defendant's statements, pursuant to General Rule 9(g); and upon the respective memoranda

filed in support and in opposition to said motions; and upon the pleadings and all prior proceedings held herein; and the Court having heard oral argument; and upon memorandum opinion number 33919 filed on August 4, 1967; it is

ORDERED, that defendant's motion to consolidate is denied except that defendant's first and second counterclaim shall be and hereby are consolidated and merged with Civil Action 152-267, already consolidated with Civil Actions 148-323 *et al.;* and it is further

ORDERED, that plaintiff's motion to dismiss the first and second counterclaims is denied; and it is further

ORDERED, that plaintiff's motion to sever the first and second counterclaims and to consolidate them with Civil Action 152-267, already consolidated with Civil Actions 148-323 *et al.*, is granted; and it is further

ORDERED, that plaintiff's motion to dismiss the First, Second, Third, Fourth and Fifth complete affirmative defenses is granted and that such defenses be and hereby are dismissed; and it is further

ORDERED, that plaintiff's motion for summary judgment on the first claim of the complaint be and the same hereby is granted with the express determination that there is no just reason for delay and with express direction for entry thereof; and it is further

ORDERED, that defendant pay to plaintiff the sum of $185,829.18 representing the amount of interline freight balances withheld prior to May 1, 1965 as determined in the arbitration award plus $20,905.80 interest through August 31, 1967, or a total of $206,734.98; and it is further

Order and Judgment of the United States District Court

ORDERED, that defendant pay to plaintiff the sum of $7,469.73 representing the sum of interline freight balances withheld by defendant from plaintiff from May 1, 1965 through September 30, 1965 plus interest in the amount of $839.41 through August 31, 1967; and it is further

ORDERED, that defendant pay to plaintiff the sum of $46,793.09, representing the sum of interline freight balances withheld by defendant from plaintiff during the period from October 1, 1965 through June 30, 1967 plus interest of $2,682,20 calculated from the time the said monthly balances became due until August 31, 1967; and it is further

ORDERED, that in addition to the above sums, which total $264,519.41 defendant pay to plaintiff all interline freight balances withheld since June 30, 1967 to date with interest, and all interest accruing after August 31, 1967 on sums withheld prior to June 30, 1967; and it is further

ORDERED, that defendant be and hereby is permanently enjoined from offsetting car hire claims against interline freight balances due to plaintiff and from withholding such balances; and it is finally

ORDERED, that costs are to be taxed against defendant.

Dated: New York, N. Y.,
September 14th, 1967.

/s/ H. R. TYLER, JR.
U.S.D.J.

The settlement of this Order
is consented to

/s/ Donovan Leisure Newton & Irvine
DONOVAN LEISURE NEWTON & IRVINE
Attorneys for plaintiff
Two Wall Street
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/s/ Clark Carr & Ellis
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Judgment No. 68,869 entered 9/14/67
/s/ JOHN J. O'LEAR, JR.
Clerk

Opinion of Judge Harold R. Tyler, Jr.

[SAME TITLE]

I

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff has moved for summary judgment upon its first stated claim in this action. This particular claim seeks judicial enforcement of a final arbitration award in favor of plaintiff on the question of whether defendant was prohibited by the mandatory freight rules of the Association of American Railroads (AAR) from offsetting per diem claims against interline freight balances and required to pay over balances withheld notwithstanding such claims.

Defendant opposes this motion upon the argument that the arbitration award does not prevent assertion of its per diem offset claims as grounds for denial of enforcement of the award. Defendant also contends that because of certain alleged misconduct in the procedural sense by the arbitrators, the arbitration proceedings were void *ab initio* and that thus the award affirmed by the appellate arbitrators should be vacated.

On the face of the papers before me, it is apparent that there is no merit to the defendant's opposition to this motion for summary judgment. Without extended discussion, it can be simply observed that the decision of this court in *Boston and Maine Corporation* v. *Chicago, Burlington and Quincy RR. Co.*, 258 F. Supp. 930 (S.D.N.Y. 1966); *aff'd.*—F.2d—(2d Cir. July 25, 1967) is controlling here. Specifically, in the context of this case, it is perfectly plain that, notwithstanding defendant's bold arguments, the arbitrators considered the set-off point under Freight Mandatory Rule 149 but rejected defendant's contentions. It is equally plain that the arbitrators also considered defendant's procedural arguments and found them baseless. By the terms of the arbitration agreement and submission, the award is final and binding. It should be enforced according to federal law. 9 U.S.C. § 1 et seq. Since no just reason for delay in entering judgment has been established, plaintiff's motion for summary judgment on its first stated claim is granted.

II

Remaining Motions of the Parties

At the time when plaintiff moved for partial summary judgment as indicated above, it also moved to dismiss the various affirmative defenses and two counterclaims asserted by defendant in this action as being without merit. In the

alternative, plaintiff has moved to consolidate the affirmative defenses and counterclaims of defendant with identical claims asserted by defendant in one or more of 108 consolidated civil actions pending in this court. *Baltimore and Ohio RR. Co.* v. *New York, N. H. & H. RR.*, Civil actions Nos. 148-323 et al. At the same time, defendant not only interposed opposition to the motion for summary judgment as discussed above but also brought on a separate motion for consolidation of this action in its entirety with the aforementioned 108 civil actions designated as Civil actions Nos. 148-323 et al. Once again the teaching of Judge Wyatt's opinion in *Boston and Maine Corporation* v. *Chicago, Burlington and Quincy RR.*, 258 F. Supp. at 934, is applicable here. Specifically, the affirmative defenses asserted by defendant must fall as an obvious consequence of the granting of summary judgment on plaintiff's first claim. As to the first and second counterclaims pleaded by defendant here, I would be inclined to follow Judge Wyatt's lead and dismiss them, if for no other reason, because it would appear that defendant has already asserted the same claims in one or more of the aforementioned 108 suits before Judge Ryan. Upon the assumption, however, that nothing should be done by me to prejudice defendant's per diem claims, I adopt the procedure of directing that the first and second counterclaims be deemed "merged" or consolidated with defendant's similar or identical claims in the cases before Judge Ryan. To this limited extent, defendant's motion to consolidate is granted; in all other respects, it is denied. See, generally, *Transmirra Products Corp.* v. *Monsanto Chemical Co.*, 27 F.R.D. 482 (S.D.N.Y. 1961).

Settle order accordingly.

August 3, 1967.

/s/ H. R. Tyler, Jr.,
U.S.D.J.

Filed: August 4, 1967
United States District Court
Southern District of New York

Opinion of the Arbitration Committee

ASSOCIATION OF AMERICAN RAILROADS

Accounting Division

Arbitration Committees

INTERLINE FREIGHT ARBITRATION CASE No. 20,141

Complainant:

BOSTON AND MAINE CORPORATION

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

(Submitted for Arbitration September 2, 1965)

(Decided October 18, 1965)

Cause of Complaint: Refusal to honor sight drafts in settlement of interline freight traffic balances.

Statement of Facts. *Nature of Proceedings.* Claim is for $185,829.18 as amended, representing amounts due the Boston and Maine because of the refusal of the Chicago & North Western to honor B&M sight drafts issued against them in settlement of Interline Freight Traffic Balances.

Due to a dispute between the B&M R.R. and the C&NW Ry. Co. concerning Car Service Balances, the C&NW has refused to honor B&M drafts for settlement of Interline Freight Traffic Balances. The Interline Freight Traffic Balances herein involved cover a period from January 1960 thru April 1965.

Opinion of the Arbitration Committee

CONTENTIONS OF CARRIERS IN DISPUTE

THE BOSTON AND MAINE CORPORATION (B&M) in its brief dated July 12, 1965, contends that the C&NW Ry. Co., by refusing to honor sight drafts issued against them for net freight traffic balances, has violated Freight Mandatory Rule 149 and should pay the B&M $185,859.82 to cover upaid freight balances for period January 1960 through April 1965, plus any amounts for draft not honored in full subsequent to April 1965. B&M states that it has made no special arrangement with the C&NW as outlined in Freight Mandatory Rule 149. B&M contends that Freight Mandatory Rule 149, allows no interpretation that would permit reduction of the net interline freight balance by amounts that are unrelated to that net balance.

The B&M points out that it is primarily a creditor of the C&NW due to the preponderance of freight shipments originating on the C&NW with freight charges prepaid, which that Company collects from the shipper for all involved carriers. The B&M also points out that Mandatory Rule 149, by directing the settling carrier to pay to each intermediate carrier its proportion of freight revenue whether the freight charges are prepaid or collect, also imposes a condition upon the originator of freight shipments with charges prepaid, by further stating that "Advances and prepaid to be included in settlement with the waybilling carrier".

Further, the B&M states that if a waybilling carrier with such an excess of prepaid forwarded shipment to a settling carrier as to become a debtor to that settling carrier, and said waybilling carrier can refuse to pay all of the net interline balance so created and hold that position while intermediate carriers collect their proportionate shares of such prepaid shipments from the settling carrier, it is readily apparent that the settling carrier can be shortly brought to the verge of or into insolvency. The B&M there-

fore contends that it is very plain that Rule 149 does not contemplate allowing this advantage to any carrier. The B&M advises that, for that purpose this rule states that advances and prepaid be included in settlement with waybilling carrier and further states that such settlement will be made on net balances which shall be immediately subject to sight draft.

The B&M also points out that there is nothing in Mandatory Rule 148 which authorizes the inclusion of any set-off other than settlement of the net balance developed from interline waybills and correction adjustments thereof. B&M cites the unanimous award in Arbitration Proceedings Number 20,140 in support of its position. B&M believes that Arbitration Case 20,140 is identical with the present case under consideration. B&M requests a decision as to whether the C&NW violated Mandatory Rule 149.

THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY in brief dated August 10, 1965, makes the following statement:

> "B&M relies upon the unsupported contention that Freight Mandatory Rule 149 prohibits a set-off for other amounts against a sight draft for net traffic balances. Rule 149 contains no such prohibition. Rule 149 and related rules govern the computation of net traffic balances and the interline settlement therof by sight draft. Said rules do not purport to enter into the law of sight drafts or set-offs. There is no basis for interpreting Rule 149 as extinguishing or limiting any right which may exist in the law to set-off another amount claimed to be due against the admitted liability for the amount of a sight draft. Whether such right exists is a question of law, outside the scope of Rule 149 which does not purport either to create or extinguish such right.

Opinion of the Arbitration Committee

"Innumerable court decisions have held that the right of set-off does exist against liability on written instruments, whether negotiable or non-negotiable. See Corpus Juris Secundum, Bills and Notes, Section 511,80 Corpus Juris Secundum, set-off and counterclaim, Section 41b(1) and cases cited therein. In the case of negotiable instrument, the right of set-off may be limited to claims which the drawee has against the holder of the instrument, negotiability preventing the drawee from setting off claims against a prior party to the instrument. C&NW's claim for per diem balances is such a claim against the holder, B&M and set-off of such a claim against the amount of B&M sight drafts is thus a legal right available to C&NW.

"In *Robinson and Evans* v. *Weatherly Lumber Company,* 78 S.E. 610, the Court held that the acceptor of a sight draft had the right to set-off a claim against the drawer arising out of an unrelated transaction.

"The Boston and Maine R.R. v. Illinois Central R.R. Co., Index No. 115/59 in the Supreme Court of the State of New York, County of New York is a suit brought by B&M to recover amounts set-off by Illinois Central against its interline freight settlements with B&M. In its answer and its counterclaim, Illinois Central relied on its right to set-off per diem balances asserted by it against B&M. B&M filed a motion to strike the counterclaim and for summary judgment on B&M's claim, referring to and relying upon Freight Mandatory Rule 149. On May 7, 1959, Mr. Justice Aurelio denied said motion, holding that the 'affirmative defenses and counterclaims are sufficient', New York Law Journal, May 7, 1959, Page 10. Such defenses and counterclaim being the same right of set-off on which C&NW here relies, said

decision is a clear legal precedent for C&NW's position. B&M's motion for reargument was denied on July 3, 1959. The decision was affirmed by the Appellate Division of the Supreme Court of the State of New York, County of New York, on April 12, 1960 and B&M's motion for leave to appeal was denied by the Court of Appeals of the State of New York, the highest court in the State, on June 9, 1960.

"Page 2 of the award in Interline Freight Arbitration Case 20,140 states:

'The Chicago, Burlington and Quincy Railroad Company offered no argument other than the statement that "Freight balances due Boston and Maine are being withheld to protect the amount due us for standard per diem which B&M has refused to pay.

'In view of the fact that the Burlington did not raise and argue the legal right of "set-off" and the precedents in support thereof, said award cannot be relied upon as a precedent in support of B&M's position.

'The issue to be determined is, does the exercise by C&NW of the legal right to set-off per diem balances asserted to be due from B&M against interline freight balances due to B&M violated Freight Mandatory Rule 149?' "

FINDINGS OF THE ARBITRATION COMMITTEE

The Interline Freight Accounting Arbitration Committee, composed of Messrs. R. D. Plumley (Substitute), J. E. McWhite, and W. H. Goodyear, Chairman, rendered a unanimous award holding that the Chicago and North Western Railway Company violated the provisions of Freight Mandatory Rule 149 and must pay the Boston and Maine Railroad $185,829.18 plus any amounts due the Boston and

Maine subsequent to April 1965. The Arbitration fee shall be assumed by the Chicago and North Western Railway Company under Arbitration Rule No. 9.

ARBITRATOR, MR. R. D. PLUMLEY (Substitute), said: I feel that there are two Railway Accounting Rules involved in this matter; namely, Arbitration Rule 19 as well as Freight Mandatory Rule 149. I feel that the submission of the Boston and Maine Corporation by their Auditor of Revenue dated August 16, 1965 headed "Reply to New Matter in Brief of Chicago and North Western" in itself entitles the Chicago and North Western Railway Company to review the statement referred to.

This is acknowledged indirectly by the Boston and Maine in letter to P. A. Lyon dated August 30th, 1965, File AR 108, since they offered to delete certain material from their reply of August 16th. In my opinion, it would be improper to allow erasure of statements already submitted. I therefore feel under Arbitration Rule 19 that the Chicago and North Western Railway Company is entitled to one rebuttal.

If it is not the consensus of opinion of the Arbitration Committee that Rule 19 has not been complied with or is irrelevant to the principal issue to be determined, then my decision with respect to application of Freight Mandatory Rule 149 is as follows:

Rule 149 Settlement of Interline Balances:

> "The settling carrier shall pay to each intermediate carrier its proportion of the interline freight revenue, whether the freight charges are prepaid or collect, advances and prepaid to be included in the settlement with the waybilling carrier. Settlements shall be made on net balances which shall be immediately subject to sight draft, except where special arrangements are made between interested carriers."

Opinion of the Arbitration Committee

In refusing to honor the Boston and Maine's Freight Traffic Balance, the Chicago and North Western Railway Company was in violation of Freight Accounting Mandatory Rule 149 which states in part, "Settlements shall be made on net balances which shall be immediately subject to sight draft, except where special arrangements are made between interested carriers."

Since there was no evidence presented to show that any special arrangements was made between the Chicago and North Western Railway Company and the Boston and Maine Corporation, it is therefore my decision that the Chicago and North Western Railway Company violated Rule 149 and should settle with the Boston and Maine Corporation for amounts withheld since January 1960 through April 1965, and comply with the instructions contained in Rule 149 on future settlements.

The arbitration fee shall be assumed in its entirety by the Chicago and North Western Railway Company under Arbitration Rule 9.

ARBITRATOR MR. J. E. MCWHITE, said: I believe Arbitration Rule 19 is irrelevant to the principle issue to be determined as the Boston and Maine Railroad, in their letter of August 30, 1965, in deleting the last sentence of paragraph 3 and the two underscored words in paragraph 4 of their letter of August 16, 1965, would not entitle the Chicago and North Western Railway Company a review of the statement referred to. In dealing strictly with the interpretation of Freight Mandatory Rule 149 it provides in clear and unambiguous language that settlements shall be made on net balances of freight revenue, including advances and prepay, which shall be immediately subject to sight draft, except where special arrangements are made between interested carriers. No provisions whatever are made for set-offs, nor does the file indicate that any special arrangements were made between the Boston and Maine.

Corporation and the Chicago and North Western Railway Company. The traffic balances were paid in reduced amounts by check, but the Boston and Maine reached an understanding with the Chicago and North Western Railway Company that acceptance of such checks would not be treated or claimed as an accord and satisfaction as to any claim they may have or suit they may file in connection with interline freight accounts, and that acceptance would be entirely without prejudice to their position on any such claim or suit.

It is my opinion that the Chicago and North Western Railway Company violated the provisions of Rule 149 to honor Boston and Maine Corporation's sight drafts for net interline freight balances and should pay the Boston and Maine Corporation for amounts withheld since January 1960 through April 1965 ($185,829.18) and comply with provisions of Rule 149 on future settlements.

The arbitration fee shall be assumed in its entirety by the Chicago and North Western Railway Company under Arbitration Rule 9.

ARBITRATOR MR. W. H. GOODYEAR, Chairman, said: The brief of the B&M was prepared July 12, 1965, covering interline settlements rendered during the period January 1960 through April 1965; therefore, the Arbitration and Mandatory Rules issued to become effective October 1, 1962, and as amended October 1, 1964, will govern as provided for in Arbitration Rule 26. In my opinion, the B&M memo of August 16, 1965, did not contain additional facts or argument, that would require further comment by the C&NW as outlined in Mandatory Rule 19. I have analyzed this memo as follows:

PARAGRAPH No. 1: The B&M merely agreed with the C&NW that the correct balance in this claim was $185,829.18.

Opinion of the Arbitration Committee

PARAGRAPH No. 2: The B&M agreed with the C&NW that in some jurisdictions in the United States there is a right to counterclaim, etc.

PARAGRAPH No. 3: The B&M merely reaffirms the position in their brief that the issue in this arbitration is not whether the C&NW has a right to set-off if sued but whether Rule 149 requires C&NW to settle freight balances without set-off. The B&M also cited Arbitration Case 20,140 as upholding their position. This is the same as in their brief.

PARAGRAPH No. 4: This paragraph did not add any new argument to the B&M brief but merely repeated this general tone of their brief.

PARAGRAPH No. 5: This paragraph does not alter the original brief because the C&NW as a member of the Railway Accounting Division A.A.R. is required to arbitrate any disputes with members of the Division under Mandatory Arbitration Rule No. 1; therefore, I find that the B&M memorandum will not affect my decision in this case.

The C&NW in their brief, rely upon court decisions holding that their right to set-off does exist against liability on written instruments, whether negotiable or non-negotiable. The C&NW further state that their claim for per diem balance is such a claim against the B&M and set-off of such a claim against the amount of B&M sight drafts is thus a legal right available to C&NW. In answer to the C&NW's contention, I wish to point out that this Committee cannot consider the legal aspects of this case but must confine their decision to the evidence contained in these papers in accordance with the Mandatory Rule as provided for in Arbitration Rules 22 and 26-a. Further, it was stated in Overcharge Arbitration Case 1050 by Arbitrator Tague that the Arbitration Committee may come to a decision only by a literal interpretation of the rules and may not reach a conclusion, no matter how reasonable, or

logical, which is arrived at by reading into the rules something which is not there.

The issue to be determined is whether the C&NW was within their rights under the Accounting Rules in refusing to honor the B&M's sight drafts covering settlement of Interline Freight Traffic Balances. I agree with Arbitrators Plumley and McWhite that in view of Mandatory Freight Rule 149, that settlements shall be made on net balances which shall be immediately subject to sight draft, except where special arrangements are made between interested carriers. I find there is no evidence in these papers to show that any special arrangements were ever made between the B&M and the C&NW prior to this dispute, to disregard the basis for settlement in Rule 149 but the C&NW withheld without agreement proportions of the B&M's interline freight revenue.

In view of the circumstances herein enumerated, I find that the C&NW violated the provisions of Mandatory Freight Rule 149 and should therefore, pay the B&M $185,829.18 plus any amounts due the B&M subsequent to April 1965 under the same rule violation. The arbitration fee shall be assumed by the C&NW under Arbitration Rule 9.

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NOTE:

Question was presented under Arbitration Rule 19 concerning the addition of a one-page statement by the Boston and Maine, after which the papers were forwarded direct to the Secretary for submission to the Arbitration Committee. In placing the proceedings with the Committee, attention was directed to the fact that this B&M statement had not been reviewed by the Chicago and North Western. The Arbitration Committee, by majority opinion, decided that the additional statement did not contain additional facts or argument that would require submission to the C&NW for further comment.—Secretary.

Opinion of the Arbitration Appeals Committee

ASSOCIATION OF AMERICAN RAILROADS

ACCOUNTING DIVISION

ARBITRATION COMMITTEES

INTERLINE FREIGHT ARBITRATION CASE No. 20,141
INTERLINE FREIGHT APPEAL CASE No. 30,046

COMPLAINANT: Chicago and North Western Railway Company

vs.

Boston and Maine Corporation

Submitted for Arbitration September 2, 1965
Decided October 18, 1965

Submitted for Appeal February 25, 1966
Decided April 7, 1966

CAUSE OF COMPLAINT: Refusal to honor sight drafts in settlement of interline freight traffic balances—Freight Mandatory Rule 149—application of Arbitration Rule 19 relating to handling of Arbitration Proceedings.

Statement of Facts. *Nature of Proceedings.* There are to be no changes in the original write-up of Interline Arbitration Proceedings No. 20,141.

ARGUMENT ON APPEAL

THE CHICAGO AND NORTH WESTERN RAILWAY, on appeal submitted January 14, 1966, from the unanimous award of the Arbitration Committee contends that the proceedings

before the Arbitration Committee are void for failure to comply with Arbitration Rule 19. They further contend that the primary issue on appeal is procedural and deals with the violation of Arbitration Rule 19. C&NW is not bound by an arbitration award which is void *ab initio* for a gross failure to observe the required arbitration procedure. Under Rule 19 C&NW was entitled as a contract right to reply to new materials filed by the Boston and Maine. It also points out that on August 16, 1965 B&M submitted papers to the Secretary of the AAR Accounting Arbitration Committee. Such papers included their initial statement of July 12, 1965 and our reply of August 10, 1965. In addition the papers included another B&M statement, dated August 16, 1965. The Secretary ruled that the August 16 statement contained new material to which we had a right of reply under Rule 19. By letter of August 18, 1965 the Secretary returned the papers to B&M for forwarding to C&NW. There apparently followed *ex parte* telephone conversations between F. A. Hyland of B&M and the Secretary in which B&M refused to abide by the Secretary's ruling. By letter dated August 30, 1965 B&M again submitted the arbitration papers containing an amended version of the August 16, 1965 statement with a demand that the Secretary forward the papers to the Arbitration Committee. On September 2, 1965 the Secretary submitted the papers to R. D. Plumley, a member of the Arbitration Committee. C&NW avers that it was not served a copy of the original August 16, 1965 statement nor the amended August 16, 1965 statement before the file was submitted to the Arbitration Committee. On October 1, 1965 North Western by its attorney, William F. Cottrell, protested the procedure involved in a letter to the Secretary. F. A. Hyland by letter of October 13, 1965 to C&NW indicated that he had "deleted the entire sentence containing 'new matter'." This letter of October 13, 1965 and the earlier filing letter of August 30, 1965 are clear

indications that B&M had filed new matter to which we had a right to reply. Moreover, to *this date* we had not been provided a copy of the original August 16 statement. Said statement upon submission to the Secretary was an *ex parte* attempt to place new maferial before the Arbitration Committee without giving C&NW an opportunity to reply. On that basis alone this proceeding should be voided.

C&NW further contends that the submission of arguments, facts, and statements in secret is sufficient to require the complete and final rejection of its claim. Such secret pleading amounts to a request for discriminatory and favored treatment. It should be noted that "from the moment (an applicant) ceases to depend upon the justice of his case and seeks discriminatory and favored treatment . . . (he) is fortunate if he loses no more than the rights he seeks to obtain." *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F.2d 514 (1948). The introduction by one party of evidence in support of his position which the other party is forbidden to see cannot be countenanced. *United States* v. *Caplan*, 185 F.2d 629, 639 (1950). C&NW further contends that the revised statement of August 16, 1965 should have been submitted them for reply. At the very least, a copy of the revised statement should have been submitted to them for a review to determine if a reply was appropriate. The revised statement of August 16, 1965 was again a second and successful form of secret pleading which was improperly considered by the arbitrators. It should be noted that Arbitrator Plumley agreed that C&NW was entitled to an opportunity to reply to the statement. C&NW also maintains that the holding by Arbitrator McWhite that Arbitration Rule 19 was irrelevant to the issue before the Committee was clearly in error since no arbitrator reading the August 30, 1965 letter of F. A. Hyland could determine what had been removed from

the pleading. Similarly, Arbitrator Goodyear's analysis of the August 16, 1965 statement is also based solely upon the amended version. As noted above, Arbitrator Plumley considers the amended statement to be material to which C&NW had a right of reply. The amended statement in paragraphs 3, 4 and 5 contains new material. The uniform decisions of the Supreme Court of the United States hold in an unbroken line of decisions, that in *any* kind of proceeding, however informal, every litigant is entitled to know and reply to every argument and all evidence advanced to the person trying his case. *Greene* v. *McElroy,* 360 U.S. 474, 496-497 (1959), *Morgan* v. *United States,* 304 U.S. 1, 18-20, *I.C.C.* v. *L. & N. R. Co.,* 227 U.S. 88, 93 (1913). For this variation of proper procedure, the award must be set aside. C&NW infers that the arbitrators have also erred in failing to recognize the legal right of set off. We refer the Appeals Committee to the ample authority cited in paragraphs 3, 4, 5, and 6 of our brief of August 10, 1965 for the proposition that C&NW has the right to set off against freight interline settlement drafts any existing amounts owed to it by B&M. See *B&M R.R.* v. *Illinois Central R.R.,* cited in paragraph 6. For the reasons stated above the Appeal Committee should reverse the Arbitration Committee and dismiss this proceeding.

THE BOSTON AND MAINE CORPORATION, on appeal submitted February 14, 1966, contends that the C&NW should have won the arbitration because Boston and Maine (B&M) violated Arbitration Rule 19—"Right of Rebuttal." That rule applies only in the event that one of the parties should happen to conduct "* * * additional investigation or attach copies of previous arbitration or appeal decisions, opinions of counsel, decisions or rulings of any lawfully constituted administrative or judicial body, tariff publications or rules, contracts, agreements or other matter *not contained in the papers,* or quotes such matters in its brief and the new

facts or authorities thus developed or cited purport to affect the liability of carriers whose briefs have already been submitted * * *". They point out that no arbitrator has ever seen the original "Reply" of B&M; and do not believe that the deleted portions contain "new matter", and even if it did, no arbitrator could be prejudiced by it, because none of them saw it. B&M is of the belief that it was complying with the Arbitration Rules in good faith when it resubmitted its "Reply" with all of the doubtful matter removed, and it did inquire of the Secretary, Mr. Lyon, as to what our proper course was, and this is specifically provided for in Rule 5. B&M also avers that the Secretary's course of action was entirely proper and correct, as was pointed out in *Minneapolis Northfield & Southern Ry.* v. *Illinois Central R.R.*, Overcharge Arbitration Case No. 1138, in which the arbitrators noted: "The alertness of the Secretary of the Accounting Division in returning claim papers to the Arbitrating carrier, MN&S Ry., to conform to the provisions of Arbitration Rule 19, makes it possible to render a decision, otherwise, it would have been necessary for this Committee to return paper with no cause of action under Arbitration Rule 27." The B&M states that Rule 19 clearly prohibits sending papers back to a carrier which has exhausted its "one rebuttal * * * and one rebuttal only." If no new material is added it would just waste weeks to unnecessarily transmit the papers back and forth. B&M also states that C&NW asserts that every litigant is entitled "to reply to every argument", further, Arbitration and courts would stop if this were so.

B&M further points out that the C&NW states in its Appeal that the B&M should lose this arbitration because it submitted "secret pleading", and that the B&M "seeks discriminatory and favored treatment." B&M states that the aforesaid statements made by the C&NW are untrue and unjust. B&M requests the Appeal Committee to uphold the decisions of the Arbitration Committee.

Opinion of the Arbitration Appeals Committee

FINDINGS OF THE APPEAL COMMITTEE

The Interline Freight Accounting Appeal Committee, composed of substitute arbitrators Messrs. I. H. Cooper, G. W. Willoughby, and C. A. Allen, Chairman, rendered a unanimous award sustaining the findings of the Interline Freight Accounting Arbitration Committee, and holding that the Chicago and North Western Railway violated the provisions of Freight Mandatory Rule 149 and must pay the Boston and Maine Corporation $185,829.18 plus any amounts due Boston and Maine Corporation subsequent to April 1965. The Chicago and North Western Railway Company shall assume in full the arbitration and appeal fees in accordance with Arbitration Rule 9.

ARBITRATOR, MR. I. H. COOPER (Substitute), said: The rather extensive record before this Committee contains much that is irrelevant to the issue involved in this proceeding. At the outset, it is crystal clear that this Committee is not a court of law; however, the decision of the arbitrators has the effect of a court judgment. I think it prudent to again repeat that which I have previously said in our arbitration proceeding that the Secretary with his full knowledge of our Arbitration Rules, timely returned the papers to the B&M before submitting them to the Arbitration Committee. Reference is made to several court cases involving litigation, and I am sure that my colleagues have full knowledge that arbitration does not imply litigation, and decision must be premised on the facts evidenced by the papers in the file comfortable to our Mandatory Rules, not technicalities of law, which is the customary practice of counsel. In other words this proceeding is an arbitration, not litigation.

C&NW made a great ado about that which is a simple matter. C&NW maintains that Arbitration Rule 19 was violated by the B&M; hence, the award of the Arbitration

Committee is void, and further contends that Freight Mandatory Rule 149 does not mean what it says. So we have two questions viz: (a) is there a violation of Arbitration Rule 19; and (b) is there a violation of Freight Mandatory Rule 149? Taking up first, the alleged violation of Arbitration Rule 19; subsequent to returning papers to the B&M by the C&NW, the B&M added a reply to brief of the C&NW and included some information that was not in its original brief. Instead of referring papers back to the C&NW for one rebuttal, the papers were sent to the Secretary. As stated above, the Secretary very timely returned papers to the B&M before submitting them to Arbitration Committee, pointing out the provisions of Arbitration Rule 19. A careful analysis of the papers is convincing that B&M reply letter contains no facts and information that is in addition to that already contained in its original brief; hence, the conclusion is inescapable. B&M deleted all additional facts or information from its reply letter. Therefore, there is no additional information to be rebutted by the C&NW. I am sure that the Secretary, Arbitration Committee, Appeal Committee and the C&NW have no knowledge of what the added information is. Therefore, what can the C&NW rebutt? The answer is "nothing." The facts of record are clear:—there is no violation of Arbitration Rule 19. Coming to Freight Mandatory Rule 149, no lengthy dissertation is necessary. The rule is subject to only one interpretation, i.e., settlements shall be made on net balances whether freight charges are prepaid or collect, advances and prepaid to be included. To take the position of the C&NW by using Rule 149 for off-setting per diem claims due from another carrier, than Rule 149 could be used under any conditions that might occur, e.g. a carrier could purchase material from another carrier, and due to lack of payment a carrier could use Rule 149 to off-set amount due from sale of its property. It is my firm belief that the C&NW violated the provisions of Freight Mandatory Rule 149.

Opinion of the Arbitration Appeals Committee

Based on the facts of record, I hereby re-affirm the unanimous decision of the Arbitration Committee in that the Chicago and North Western Railway Company violated the provisions of Freight Mandatory Rule 149 and must pay the Boston and Maine Railroad $185,829.18, plus any amounts due Boston and Maine Railroad subsequent to April 1965. The Chicago and North Western Railway Company shall assume in full the arbitration and appeal fees in accordance with Arbitration Rule 9.

ARBITRATOR, MR. G. W. WILLOUGHBY (Substitute), said: As the Secretary of the Association of American Railways returned the papers to the Boston and Maine Corporation, pointing out the provision of Arbitration Rule No. 19, the B&M deleted the additional information before submission to the Arbitrators, therefore, there would be no additional information to be rebutted by the C&NW.

This arbitration committee cannot consider legal aspects, but must confine their decisions on the evidence contained in this file in accordance with Railway Accounting Rules. Freight Mandatory Rule 149 reads as follows:

> The settling carrier shall pay to each intermediate carrier its proportion of the interline freight revenue, whether the freight charges be prepaid or collect, advances and prepaid to be included in the settlement with the waybilling carrier. Settlements shall be made on net balances which shall be immediately subject to sight draft, except where special arrangements are made between interested carriers.

The only interpretation is that, settlement in question shall cover Interline Freight Revenue, only. As this file contains no evidence of any special arrangements, having been made between the B&M and the C&NW, in settlement of Interline Freight Balances, the C&NW violated this rule by not honoring sight drafts of the B&M in the settlement of Interline Freight Traffic Balances.

Opinion of the Arbitration Appeals Committee

The Chicago and North Western Railway violated the provisions of Freight Mandatory Rule 149 and must pay the Boston and Maine Corporation $185,829.18, plus any amounts due the Boston and Maine Corporation, subsequent to April 1965. Arbitration and appeal fees shall be assumed in their entirety by the Chicago and North Western Railway, in accordance with Arbitration Rule 9.

ARBITRATOR, MR. C. A. ALLEN (Substitute), Chairman, said: I concur, without qualification, in the decision of Appeal Arbitrators Cooper and Willoughby. These arbitrators have clearly and concisely commented on all the issues involved in this matter and any comments by this Arbitrator would, of necessity, be repetitious. Nonetheless I wish to emphasize that it is my firm opinion that the Secretary monitored the direction of papers in this case in an efficient manner and in accordance with the rules, thereby precluding any violation of Arbitration Rule 19 or the inherent rights of the carriers concerned in this issue.

This matter now resolves itself to the basic issue as to whether the C&NW violated the provisions of Freight Mandatory Rule 149. The text of Rule 149 is rigid as to interpretation leaving no doubt whatsoever but that it spells out one conclusive requirement to the effect that settlements of interline balances shall be made on net balances whether freight charges are prepaid or collect, advances and prepaid included. To attempt arbitrary collection of any amount other than those contemplated under Rule 149 is in violation thereof.

The Chicago and North Western Railway Company viloated the provisions of Freight Mandatory Rule 149 and must pay the Boston and Maine Corporation $185,829.18, plus any amounts due Boston and Maine Corporation subsequent to April 1965. The Chicago and North Western Railway Company shall assume in full the arbitration and appeal fees in accordance with Arbitration Rule 9.

Notice of Motion for Extension of Time to File Appellant's Brief

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 31995

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE, that upon the annexed affidavits of Larry S. Provo, sworn to February 7, 1968 and Donald L. Wallace, Esq., sworn to February 9, 1968, appellant Chicago and North Western Railway Company will move this Court at a regular session thereof to be held at the United States Court House, Foley Square, New York, New York, on Monday, February 19, 1968, at 10:30 A.M., or as soon thereafter as counsel can be heard, for an order pursuant to Rule 19(b) of the Rules of the United States Court of Appeals for the Second Circuit, that appellant's time to serve and file its brief on appeal be extended from February 13, 1968 to March 12, 1968.

PLEASE TAKE FURTHER NOTICE, that pursuant to said Rule, any papers in response shall be served and filed not later than 2:00 P.M. on February 16, 1968.

Dated: New York, New York,
February 9, 1968.

Notice of Motion for Extension of Time to File Appellant's Brief

Yours, etc.,

CLARK, CARR & ELLIS

By /s/ DONALD L. WALLACE

A member of the firm
Attorneys for Appellant
Chicago and North Western
Railway Company
New York, N. Y. 10005
DI 9-2020

To:

DONOVAN LEISURE NEWTON & IRVINE
Attorneys for Appellee
Boston and Maine Corporation
Two Wall Street
New York, N.Y. 10005

Affidavit of Donald L. Wallace

No. 31995

[Same Title]

State of New York
County of New York } ss.:

Donald L. Wallace, being duly sworn, deposes and says:

1. I am a member of the firm of Clark, Carr & Ellis, attorneys for Chicago and North Western Railway Company, the appellant herein, and as such I am familiar with the facts and circumstances involved in this litigation.

2. This affidavit is submitted in support of a motion by appellant for an order pursuant to Rule 19(b) of the Rules of the United States Court of Appeals for the Second Circuit, that appellant's time to serve and file its brief on appeal be extended from February 13, 1968 to March 12, 1968.

3. The record on appeal in this case was docketed on January 5, 1968. Appellant's brief was due on February 6, 1968, which date was, by stipulation, extended to February 13, 1968.

4. Both before and after September, 1967, I had advised Chicago and North Western Railway Company as to the status of all negotiations known to me with respect to the per diem issue as it affected all railroads. Chicago and North Western Railway Company has advised me on numerous occasions that the details of a settlement pro-

posal to Boston and Maine Corporation were under active consideration by management, and I would be authorized to negotiate a settlement in the near future. This situation continued until the morning of February 7, 1968. At all times prior thereto, I was directed not to prepare a brief on appeal because it was likely that a settlement of this action would be consummated and the brief on appeal would be unnecessary.

5. On the morning of Wednesday, February 7, 1968, I was advised by William F. Cottrell, Esq. of the Chicago and North Western Railway Company that the President, Larry S. Provo, had just advised him, and he was instructed to advise me, that I was to perfect the appeal in this action and settlement negotiations were not to take place. I advised counsel for the Boston and Maine Corporation of these facts immediately thereafter. A request was made for an extension of time. This request was denied.

6. I make this affidavit in good faith and not for the purpose of delay.

7. No previous application for the relief requested herein has been made.

/s/ DONALD L. WALLACE.

(Sworn to February 9, 1968.)

Affidavit of Larry S. Provo

[Same Title]

State of Illinois
County of Cook } ss.:

Larry S. Provo, being duly sworn, deposes and says:

I am President of the Chicago and North Western Railway Company. I have held this position since July 6, 1967. Prior to that date I was Vice President and Comptroller from 1956-1963, Vice President–Finance 1963-1966, and Executive Vice President from 1966-1967. As President of Chicago and North Western Railway Company I have the responsibility for approving settlement proposals and settlements involving litigation, including disputes with other railroads over the payment of per diem charges for use of our freight cars.

I am familiar with the dispute between this Company and Boston and Maine which is the subject of this appeal. I was the chief accounting officer who recommended our Company policy of withholding interline freight settlements from Boston and Maine from 1960-1967 as an offset against per diem amounts which we have claimed Boston and Maine has owed to this Company from 1953 to 1967. This policy of withholding is the subject of this appeal.

In recent months we have undertaken a detailed review of our dispute with Boston and Maine with the hope of reaching a settlement of past per diem amounts owed to us by Boston and Maine. Such a settlement would have disposed of this appeal. We have also reviewed the settlements reached between Boston and Maine and other carriers during 1967. Prior to January 30, 1968 we were formulating a settlement proposal which would have been presented to Boston and Maine on February 2, 1968. On January 30, 1968 the Interstate Commerce Commission issued its decision in the basic per diem controversy, *Chi-*

cago, Burlington & Quincy R. Co., Et. Al. v. *New York, Susquehanna & Western Railroad Co.*, I.C.C. Docket No. 31358, in which the I.C.C. determined the proper amounts to be paid for past per diem, including the proper amounts to be paid by Boston and Maine to us. The I.C.C. decision obviously had to be taken into consideration by us in evaluating our settlement proposal since if the I.C.C. decision were final it would resolve the dispute over per diem and eliminate the need for this appeal. We are presently willing to settle the dispute on the basis determined by the I.C.C. in its report. We understand, however, that Boston and Maine has begun court review of that decision before a 3 judge U.S. District Court in Boston to challenge the I.C.C. determination. We also understand that Boston and Maine has within the past week turned down a settlement proposal on the I.C.C. basis which was made by another railroad involved in a similar dispute over past per diem amounts. Accordingly, it has now become apparent to us that a settlement on the I.C.C. basis which we also propose would be rejected by Boston and Maine.

We had previously advised our New York counsel, Clark, Carr and Ellis, that this appeal should be delayed pending negotiations for a settlement. Accordingly, New York counsel have refrained from instituting the briefing of the appeal to this Court pending the outcome of settlement negotiations. With the obvious need to continue this appeal because a settlement on the I.C.C. basis would not be acceptable to Boston and Maine, we have this date instructed New York counsel to proceed with the briefing of the matter to this Court. Until 10 a.m., Central Time, of this date, New York counsel had not had notice from us to proceed with the appeal. We believe we have been diligent in reviewing the I.C.C. decision of January 30, 1968 and that we have necessarily needed the time since that date to evaluate a possible settlement as an alternative to prosecuting the appeal.

/s/ LARRY S. PROVO

(Sworn to February 7, 1968.)

Notice of Motion for Summary Affirmance or Alternatively to Dismiss the Appeal

[Same Title]

Sirs:

Please Take Notice, that upon the annexed affidavit of Robert S. Ogden, Jr., and upon all of the proceedings had herein, Appellee will move this Court at the Court House in Foley Square, New York, N. Y. on February 19, 1968 at 10:30 A.M., or as soon thereafter as counsel can be heard for summary affirmance of the judgment of the District Court or alternatively to dismiss the appeal on the grounds that the appeal is frivolous, raises no substantial question and is interposed solely for the purpose of delay.

Dated: New York, N. Y.,
February 14, 1968.

Yours, etc.,

Donovan Leisure Newton & Irvine,
Attorneys for Appellee,
Office and P.O. Address,
2 Wall Street,
New York, New York 10005.
RE 2-4100

To:

Clark Carr & Ellis, Esqs.,
Attorneys for Appellant,
120 Broadway,
New York, New York 10005.

arbitration award here are frivolous and wholly without substance. The first ground asserted is that B&M waived arbitration of the question of whether the Freight Mandatory Rules prohibited the withholding of interline freight balances by asserting an antitrust counterclaim in Civil Action 152-267, an action commenced in 1959 against B&M by appellant on its freight car rental (per diem) claims. (This is one of the cases consoliated with *Baltimore and Ohio R.R.* v. *New York, N.H. and H. R.R. Co.*, Civil Action 148-323 *et al.*) While this ground was asserted by appellant as an affirmative defense in its answer, it was neither briefed by the Chicago and North Western below nor urged on oral argument and is apparently not urged seriously.

The fact is that the counterclaim, which is set forth in full as Exhibit B to the Ogden affidavit in support of the motion for summary judgment below, had nothing to do with the parties' contractual obligations under the Freight Mandatory Rules of the AAR not to withhold interline freight balances as a setoff to freight car rental claims. Indeed, B&M's answer asserting the antitrust counterclaim was served and filed on December 21, 1959, *prior* to the time when appellant had even begun withholding such balances from appellee, and the counterclaim was dismissed in 1961, several years before the arbitration.

7. The second new ground asserted by appellant in this case, but not by the Chicago, Burlington and Quincy R.R. in the earlier case decided by this Court, relates to the submission to the Arbitration Committee by B&M of a one page reply to appellant's arbitration brief before serving it on appellant (appellant was not sent a copy until a few days before the Arbitration Committee's decision was rendered). The fact that the arbitrators considered this one page reply which appellant claimed it was denied an opportunity to rebut is alleged to constitute such misconduct and excess of powers as to render the arbitration void.

8. This issue is also completely without substance. The procedural rules by which arbitrations under the Railway Accounting Rules are governed are set forth in certain Mandatory Arbitration Rules which are printed as a part of Railway Accounting Rules by which the parties agreed to be bound.

9. Appellant asserted to the Arbitration Committee prior to the rendering of the arbitration award that appellee had violated the arbitration rules by filing the reply without first serving it. The arbitrators considered this allegation, and held that no procedural violation had occurred. (Opinion of Arbitration Committee is attached hereto as Exhibit D.)

10. Appellant appealed the award of the Arbitration Committee to the Arbitration Appeal Committee, under arbitration appeal procedures established in the Mandatory Arbitration Rules. One of the primary grounds of the appeal was the filing of the reply before service on appellant, which appellant urged voided the award. The decision by the Appeal Committee specifically ruled on this contention, unanimously rejected Appellant's argument, and affirmed the award. (Decision of Arbitration Appeal Committee is annexed hereto as Exhibit E.)

11. No impropriety of any sort has been attributed by Appellant to the conduct of the arbitration appeal procedures which resulted in the rejection of all of Appellant's contentions and the affirmance of the award.

12. All other defenses asserted by Appellant here were asserted and overruled in the *Boston and Maine Corp.* v. *Chicago Burlington and Quincy R.R.* case.

Affidavit of Robert S. Ogden, Jr.

13. On information and belief, the issues raised in this case have all been determined by this Court in its July 25, 1967 decision in Docket No. 31033 or are otherwise so frivolous and insubstantial as to make exercise by the Court of its plenary power to grant summary affirmance or to dismiss an appeal appropriate in this instance. It would appear that the sole reason for prosecuting the appeal is to delay even further the transmittal of the interline freight balances improperly withheld from B&M.

/s/ Robert S. Ogden, Jr.

(Sworn to February 14, 1968.)

United States Arbitration Act, Sections 9 and 10, 9 U.S.C. §§ 9 & 10

§ 9. Award of Arbitrators; Confirmation; Jurisdiction; Procedure

If the parties in their agreement have agreed that a judg- title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; Vacation; Grounds; Rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Freight Mandatory Rule 149

SETTLEMENT OF INTERLINE BALANCES

149. The settling carrier shall pay to each intermediate carrier its proportion of the interline freight revenue, whether the freight charges are prepaid or collect, advances and prepaid to be included in the settlement with the waybilling carrier. Settlements shall be made on net balances which shall be immediately subject to sight draft, except where special arrangements are made between interested carriers. [Association of American Railroads, *Railway Accounting Rules* 57 (1965).]

Mandatory Arbitration Rules, 1, 22, 25 and 26 *

1. Procedure in Respect to Application of Rules and in Cases of Disagreements

When any member of this Division disagrees with another member as to the application of a mandatory rule, he may submit his case to the Secretary for presentation to the appropriate Arbitration Committee for a decision. The decision of the majority of that Committee shall be binding on the parties involved, except that they shall have the right of appeal to the Appeal Committee on matters involving freight and overcharge rules, as provided by Rule 33.

22. Duties of Arbitration Committees

The Arbitration Committees shall consider and act upon all cases submitted to them, involving disputes arising out of the application of Mandatory Rules. The decision of the majority of a committee shall be bindng upon the carrers involved except that in cases involving Freight or Overcharge Rules, the carriers shall have the right of appeal as provided in Rule 33.

25. Equity Power

The Committee shall have no equity powers, and shall not apply a penalty to a rule which does not specifically provide a penalty, but they may render an award upon an equity basis on cases covered, or not covered, by Manda tory Rules if all parties interested consent thereto in writing, and which consent is made a part of the submission.

26. Decisions

A. The arbitrators shall decide upon the evidence contained in the papers in accordance with the Mandatory Rules, regardless of any rule specifically set forth by any carrier participating in the arbitration or appeal.

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* Association of American Railroads, *Railway Accounting Rules* 377, 382-83 (1965).

Mandatory Arbitration Rules 1, 22, 25 and 26

The Mandatory Arbitration Rules in effect on date brief is prepared by the arbitrating carrier, including those covering the apportionment of arbitration fees, shall apply.

In arbitration proceedings under Freight or Overcharge Accounting, they shall decide as to the points in dispute in accordance with the Mandatory Rules as follows:

(1) Freight Accounting.—Rules in effect at the time the shipment moved; the date of the original waybill to govern, except that on disputes involving settlement or adjustment of settlement, the rules in effect at the time the settlement or the adjustment of settlement was made shall govern, except that when a rule provides a specific date, either for its application, or for waybills, settlements, or other transactions to which it applies, such date shall govern.

(2) Overcharge Accounting.—Rules in effect when paying carrier originally apportioned claim shall govern. If no apportionment of the claim has been made prior to submission to the Committee, rules in effect on date brief is prepared by arbitrating carrier shall govern.

B. The arbitrators shall render decision on each question submitted, and such decision shall be explicit and consistent so that it can be complied with and shall definitely refer to the rule(s) or sections(s) of the rules(s) under which their decision is made and the arbitrators joining in the majority decision shall agree upon and give their decision under the same rule(s).

C. In arbitration under the Overcharge Rules, the arbitrators shall take cognizance of the Freight Rules.